SUPREME COURT, U.S.
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No. 94-455

In The

Supreme Court of the United States

October Term, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE,

Petitioners,

v.

HOUSTON JONES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether there is a conflict in the Circuit Court of Appeals with respect to the extent to which an Appeals Court should review purely factual determinations in the course of a "qualified immunity" interlocutory appeal.

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STATEMENT OF THE CASE

This case stems from an incident which occurred on November 6, 1990 where certain police officers of the Village of Villa Park arrested the Respondent, HOUSTON JONES, in a parking lot for disorderly conduct, battery on a police officer and resisting arrest. HOUSTON JONES has maintained that the police officers brutalized him both at the scene of the arrest and while he was handcuffed in the police station. The only fact which is not in dispute is that Mr. Jones was hitting his forehead on an aluminum door at a muffler shop where the arrest took place and was doing so when Officer Heidlemeyer first approached him. Mr. Jones appeared intoxicated but it was learned he was experiencing hypoglycemia, or more commonly, insulin reaction. HOUSTON JONES affirmatively identified Officers Heidlemeyer and Esposito as being two police officers who repeatedly beat him at the police station. There is also evidence that Officers JOHNSON, DEEVEY and PAYNE were present at the scene of the arrest and at the police station when the beatings took place.[1]

JONES brought a several count Complaint against all of the police officers and the Village of Villa Park. A series of counts brought against the officers and the Village related to the use of excessive force and were

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[1] During the course of discovery, it was learned that Officer Stuart Lucatto was not at the scene of the arrest and was waiting outside in a squad car to drive Jones to the hospital for his injuries and did not witness any beatings at the scene of the arrest or in the police station and therefore, was voluntarily dismissed on Plaintiff's Motion.

brought under 42 U.S.C. §1983 and various State Court claims. The other grouping of counts brought against these Defendants involved the "probable cause" type of claims. Defendants moved for summary judgment on the excessive force claims and on the claims involving "probable cause". The Defendant asserted that with respect to the probable cause type of claims or more particularly, the false arrest, false imprisonment and malicious prosecution claims, that the undisputed facts showed that there was probable cause for the arrest of the Plaintiff at the situs of the muffler shop. With respect to the excessive force and battery type claims, the Defendants, JOHNSON, DEEVEY and PAYNE, asserted that there was not a scintilla of evidence that they struck the Plaintiff or were present during any of the beatings. The other two Defendants, HEIDLEMEYER and JOHNSON, with respect to the excessive force and battery type claims, asserted that the Plaintiff had no recollection of the events and therefore, they should escape liability for any alleged brutality.

The Trial Court found ample evidence in the record to provide a question of fact as to the Plaintiff's version of the events versus the Defendants and therefore, denied Defendant's Motion for Summary Judgment in all respects. App., *infra*, 4a-10a. Defendant, Petitioners TYSON JOHNSON, ROBERT DEEVEY and JOHN PAYNE, appealed this decision in the United States Court

of Appeals for the Seventh Circuit.[2] The Petitioners' interlocutory appeal was two part: (1) With respect to the excessive force and battery type claims, they asserted that there was not a scintilla of evidence that exists that any of the Petitioners punched or struck the Plaintiff or observed any other police officer doing so and; (2) With respect to the "probable cause" type claims for false arrest, false imprisonment and malicious prosecution, the Petitioners asserted that there was probable cause for the arrest and therefore, these claims must fail. The Circuit Court of Appeals dismissed the false arrest, false imprisonment and malicious prosecution claims because it was not disputed that the Plaintiff did appear intoxicated and was hitting his head on a garage door. This, the Court found, was enough to constitute probable cause. App., *infra*, 1a-3a.

However, with respect to the excessive force and battery type claims, the District Court held that it lacked jurisdiction because the law is clearly established at the time of this incident that standby police officers are liable for beatings that are in their presence or that they knew about at the time the abuse was occurring.[3] The Circuit Court of Appeals stated that it lacked jurisdiction with respect to reviewing these claims because the question of these Respondents' involvement in the beatings was purely a factual dispute or an "I didn't do it" defense. App., *infra*, 1a-3a. Therefore, with respect to the excessive

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[2] Defendants, Genero Esposito and John Heidlemeyer did not appeal the ruling of the District Court and were not part of that appeal and are not part of this appeal.

[3] *Byrd v. Brischke*, 466 Fed.2d 6 (7th Cir. 1972).

force type claims, the appeal was dismissed. App., *infra*, 2a, 3a.

Petitioners have taken the position that a Circuit Court of Appeals should review all interlocutory appeals where a qualified immunity defense is asserted even if the only issue on appeal is purely a factual one. In support of their position, Petitioners have cited decisions of Appellate Courts in several of the Circuits that have reviewed an interlocutory appeal when there is only a question of fact to resolve. Petitioners argue that those Circuits are in conflict with the Seventh Circuit and other Circuits which will review a District Court's decision only when there is a question of law to be decided or where there is legal uncertainty.

Upon a review of the decisional law in the various Circuits, Respondent agrees that there is a conflict with respect to whether a Circuit Court of Appeals should review an interlocutory appeal taken from a denial of a Motion of Summary Judgment where a qualified immunity defense is asserted and where the only issue on appeal is purely a factual question. These matters fall in two categories: (1) One category is where the facts are disputed and the Defendants simply seek appellate jurisdiction premised on the argument that, "I wasn't there", or "I didn't do it" and; (2) Where the appellant has asserted appellate jurisdiction based on the peculiarly fact bound legal issue of whether there was enough evidence in the record to create a question of fact to warrant a denial of a Motion for Summary Judgment or the "evidence sufficiency" appeal.

ARGUMENT

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A UNITED STATES COURT OF APPEALS SHOULD REVIEW INTERLOCUTORY APPEALS THAT RAISE ONLY THE QUESTION OF WHETHER A DISTRICT COURT CORRECTLY DECIDED TO SEND A FACTUAL ISSUE TO A JURY

In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), this Court held that a District Court's denial of a claim of qualified immunity is an appealable "final decision" under 28 U.S.C.A. §1291 to the extent that it turns on an issue of law, notwithstanding the absence of a final judgment. *Mitchell*, 472 U.S. at 530, 105 S.Ct. at 2817. The concept of "qualified immunity" for certain officials stems from *Harlow v. Fitzgerlad*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), which recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the essentially legal question whether the conduct of which the Plaintiff complains violated clearly established law. *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2816. This Court determined that a denial of qualified immunity is immediately appealable because it conclusively determines the right not to stand trial and because it involves a legal issue "conceptionally distinct" from the merits of the Plaintiff's claim. The issue immediately appealable is the purely legal one of whether the facts alleged support a claim of violation of clearly established law. *Mitchell*, 472 U.S. at 528 n.9, 105 S.Ct. at 2816 n.9. Therefore, in order for an interlocutory appeal to be properly before a Circuit Court of Appeal, the appellant must show that the law they are accused of violating was not clearly established or that there was some confusion or uncertainty in the law. The Appellate

Court need not even consider the correctness of the Plaintiff's version of the facts, nor determine whether the Plaintiff's allegations actually state a claim. All it need determine is a question of law. *Mitchell*, 472 U.S. at 528, 105 S.Ct. at 2816.

The Supreme Court considered the qualified immunity appeal again in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), and it was recognized that facts play a role in *Mitchell* appeals. The reason a Court of Appeals examines the facts is to determine whether the law allegedly violated was clearly established at the time that such deeds were forbidden. *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3039. Since these cases have been decided, there have been many decisions in the various Circuits addressing this issue. The issue typically arises in one of two ways: (1) The Defendant loses the Motion for Summary Judgment where the facts are disputed as to whether the Defendant did the violation complained of or whether the Defendant was present during the violation; and (2) the facts are not necessarily in dispute between the parties but the Defendant asks the Circuit Court of Appeals to review whether there was sufficient evidence of a violation for the District Court to be warranted in denying their Motion for Summary Judgment.

1. THE DISPUTED FACTS "I DIDN'T DO IT" OR "I WASN'T THERE", DEFENSE CASES

The overwhelming majority of Circuit Court of Appeals that have directly addressed the question as to

whether or not there is appellate jurisdiction for an interlocutory appeal where there is nothing more presented to the Court of Appeals than a factual dispute, have held that *Mitchell* does not authorize an appeal under such circumstances. *Kaminsky v. Rosenblum,* 929 F.2d 922 (2d Cir. 1991) (Factual finding was essential to resolving the issue of qualified immunity and the District Court's denial of appellant's Summary Judgment Motion was not based on misapprehension or misapplication of law. Inasmuch as there were unresolved disputed questions of fact outstanding, the District Court's order was not final and the Appellate Court lacked jurisdiction over the order appealed from and therefore the Appeal was dismissed.); *Ryan v. Burlington County,* 860 F.2d 1199 (3rd Cir. 1988) (Appellate Court would not examine disputes over facts that concern liability because those are not material to the review of the denial of the Motion for Summary Judgment based on claimed qualified immunity); see also: *Lion Boulos v. Wilson,* 834 F.2d 504 (5th Cir. 1987); *Velasquez v. Senko,* 813 F.2d 1509 (9th Cir. 1987); *Elliott v. Thomas,* 937 F.2d 338 (1991). If a Defendant presented an appeal to the Appellate Court in any of these Circuits requesting review of a denial of a Motion to Dismiss, the appeal would be dismissed *if* the only issue put forth was whether the District Court correctly decided a disputed issue of fact as to whether the Defendant violated a clearly established law at the time of the alleged violation.

The First Circuit does not follow or is not in harmony with the Second, Third, Fifth, Seventh and Ninth Circuits concerning this as the First Circuit has reviewed an

interlocutory appeal where the law was clearly established but the Defendants appealed on the basis that the District Court improperly ruled on questions of fact. *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988). In his dissent, Judge Breyer disagreed with the Court as to the extent to which it should have reviewed purely factual determinations in the course of a qualified immunity interlocutory appeal. It seems that Judge Breyer would follow the position of the Second, Third, Fifth, Seventh and Ninth Circuits concerning this issue in not allowing appellate jurisdiction where there are factual disputes between the parties concerning what happened and who was present during the violation. Therefore, since there seems to be a division among the Circuits and disagreement among judges sitting in the same Circuit as to whether appellate jurisdiction for an interlocutory appeals lies where the only issue involves a factual dispute, this Court should clarify whether a Defendant who loses a Motion for Summary Judgment can gain an immediate interlocutory appeal on the basis that the District Court improperly decided a question of fact. This Court should answer whether a Defendant can obtain review of a District Court's ruling when the only issue that the Defendant raises before the Court is a factual dispute that "he didn't do it" or, "he wasn't there". There must be some uniformity established among the Circuits with respect to this issue.

2. THE INSUFFICIENT EVIDENCE APPEALS

All of the cases cited in Petitioner's Brief deal with this issue, with the exception of *Unwin*. All of the decisions cited in the Petitioner's Brief presented a situation

where a particular Circuit Court of Appeals reviewed a District Court's denial of a Motion for Summary Judgment to determine whether the evidence was sufficient to warrant such a denial. The decisions cited by the Petitioners in their Brief are from the First, Fourth, Eighth and Tenth Circuits and District of Columbia. *See: Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986); *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87 (1st Cir. 1994); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Turner v. Dammon*, 848 F.2d 440 (4th Cir. 1988). These Circuits, *unlike* the Second, Third, Fifth, Seventh and Ninth Circuits, have reviewed appeals involving nothing but a factual issue. The difference between this category of appeals and the "I didn't do it" or "I wasn't there" appeals is that the facts are not necessarily in dispute between the parties. The Defendants assert that, based on the record before the District Judge, the evidence was not sufficient to warrant a denial of their Motion for Summary Judgment. The Petitioners in the case at bar brought an "I didn't do it" or "I wasn't there" defense under the guise of an "evidence sufficiency" appeal when they stated in their Brief that there was not a scintilla of evidence that the Defendants did the acts complained of or that they were present at the time HOUSTON JONES was beaten. App., *infra* 2a. The Court should decide if this type of an issue is appropriately decided in an interlocutory appeal. Perhaps Judge Breyer, in his dissenting opinion in *Unwin v. Campbell* was correct in suggesting that the Supreme Court in *Mitchell* has not answered the question as to whether a Circuit Court of Appeals has jurisdiction over an interlocutory appeal when the only question is whether the

evidence was sufficient to warrant a District Court's denial of a Motion for Summary Judgment.

There is no question that if it can be shown that there is uncertainty in the law or that the applicable law controlling in a particular situation is not clearly established, then a Circuit Court of Appeals certainly has jurisdiction to clarify what the law is and review whatever pertinent facts in determining what law was allegedly violated. The question which is not clear is whether there should be Appellate jurisdiction to review a District Court's ruling on the basis that there was not sufficient evidence in the record to warrant the District Court's Decision. This is not necessarily a situation where there are two completely different versions of the parties concerning what events took place during the alleged violation and who was present. The decisions cited by the Petitioners from the First, Fourth, Eighth and Tenth Circuits seem to hold that a Court of Appeals should be allowed to review a factual record and determine an exclusively factual issue in deciding whether or not there is evidence sufficient for a District Court's finding that the Defendants did the acts complained of or were present at the time of the alleged violation. *See: Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986); *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87 (1st Cir. 1994); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Turner v. Dammon*, 848 F.2d 440 (4th Cir. 1988). This approach is in conflict with the Second, Third, Fifth, Seventh and Ninth Circuits that do not accept review of an exclusively factual dispute under any circumstances.

CONCLUSION

There have been many arguments contained in the opinions as to whether a Circuit Court of Appeals should or should not review matters which put forth only factual determinations and these arguments and issues should be explored further by this Court.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3777
Houston Jones,

Plaintiff-Appellee,

v.

Tyson Johnson, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 91 C 7095-**Joan B. Gottschall,** Magistrate Judge.

Argued May 10, 1994 – Decided June 14, 1994

Before Eschbach, Easterbrook, and Kanne, Circuit Judges.

Per Curiam. Defendants have filed an interlocutory appeal to assert the defense of official immunity.

Although *Mitchell v. Forsyth,* 472 U.S. 511, 524-29 (1985), permits immunity appeals under the collateral order doctrine, we held in *Elliott v. Thomas,* 937 F.2d 338 (7th Cir. 1991), that defendants may urge only legal issues on such appeals. Accord, *Crawford-El v. Britton,* 951 F.2d 1314, 1317 (D.C. Cir. 1991); see also *Meyer v. Robinson,* 992 F.2d 734, 737-38 (7th Cir. 1993). A cry of "we didn't do it" does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of

official immunity. To see that appellants are contending that they did not commit the acts of which plaintiff accuses them, one need not get beyond the first argument heading in their brief:

> WHERE NOT A SCINTILLA OF EVIDENCE EXISTS THAT ONE OR MORE OF THE DEFENDANTS, JOHNSON, DEEVEY OR PAYNE, EVER STRUCK, PUNCHED OR KICKED THE PLAINTIFF, OR EVER OBSERVED ANYONE DOING SO – EITHER IN THE PARKING LOT OR IN THE POLICE STATION – SAID DEFENDANTS ARE ENTITLED TO A SUMMARY JUDGMENT ON THE PLAINTIFF'S "EXCESSIVE FORCE" CLAIMS

Defendants do not deny that if they beat the plaintiff, as he believes they did, then they lack immunity. Whether they beat the plaintiff is a question that must be resolved in the district court before it may be reviewed on appeal. When asked at oral argument if they could lose the factual dispute and still prevail, defendants' lawyer answered no. In consequence, we lack appellate jurisdiction over the contention that the defendants did not commit or abet battery.

The excessive force claim must be distinguished from the plaintiff's argument that the defendants lacked probable cause to arrest him. It is undisputed that an officer found plaintiff, apparently intoxicated, hitting his head against a building, and took him into custody. These facts imply disorderly conduct, which supports an arrest. Plaintiff contends that he was not drunk but was suffering from an insulin reaction, and that the police should have figured this out. The magistrate judge, presiding by

consent under 28 U.S.C. §636(c), concluded that plaintiff had not adduced sufficient evidence to dispute the officers' version of the arrest – which, if accepted, entitles them to immunity if not to prevail outright. *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991); *Mahoney v. Kesery*, 976 F.2d 1054, 1057-59 (7th Cir. 1992). But the judge concluded that because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried.

This approach is mistaken. Summary judgement is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Immunity claims should be resolved as early in the case as possible -- and by the court rather than the jury. *Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Elliott*, 937 F.2d at 344-45. On the facts that this record presents, taken in the light most favorable to plaintiff, an arrest did not "violate clearly established . . . rights of which a reasonable person would have known". *Harlow*, 457 U.S. at 818. The three appellants therefore are entitled to qualified immunity on the false arrest claim.

The judgment on the false arrest claim is reversed, and the appeal is dismissed to the extent appellants seek review of the excessive force claim.

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APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HOUSTON JONES, Plaintiff, v. VILLAGE OF VILLA PARK, a municipal corporation, JOHN HEIDELMEIER, TYSON JOHNSON, G. ESPOSITO, ROBERT DEEVEY, JOHN PAYNE, and STUART LUCADO, Defendants.	)	No. 91 C 7095

MEMORANDUM OPINION AND ORDER

This matter is before the court on defendants' motion for summary judgment. For the reasons set forth below, the motion is denied.

Background

The five individual defendants in this action under 42 U.S.C. §1983 are John Heidelmeier ("Heidelmeier"), Tyson Johnson ("Johnson"), G. Esposito ("Esposito"), Robert Deevey ("Deevey") and John Payne ("Payne"). All were police officers of the Village of Villa Park, Illinois ("Village") at the time of the events giving rise to this dispute. Village is named as a defendant only in plaintiff's pendent claims under state law. Since the commencement of this lawsuit, foul [sic] counts of plaintiff's ten-count complaint have been dismissed, including

a claim against Village under §1983. Defendants now seek judgment in their favor on the remaining counts of the complaint. The claims in question are the alleged violations of Fourth Amendment rights in Count I, and state law claims of false arrest, false imprisonment, malicious prosecution, assault and battery. Since those claims are apparently subsumed into the claim of "willful and wanton misconduct" in Count V, that claim would not survive the dismissal of the other counts.

Facts relevant to this motion are few. It is undisputed that on November 6, 1990, Heidelmeier responded to a report of an apparently intoxicated man in or near an intersection in Village. Upon his arrival, Heidelmeier found plaintiff hitting his head or forehead against the door of a building. Heidelmeier then approached plaintiff in an attempt to ascertain whether there was a problem. From this point, the parties' versions of the facts diverge.

Heidelmeier states that when he asked plaintiff what was happening, plaintiff placed his hands in his pockets and began to fidget with something that later turned out to be a pocketknife in a scabbard. When Heidelmeier attempted a pat-down search, plaintiff struck him in the arms with a clenched fist. At that point, Heidelmeier decided to place plaintiff under arrest and he forced plaintiff to the ground in order to handcuff him behind his back. Heidelmeier could not accomplish this task alone because of plaintiff's struggling. In the interim, the other individual defendants had arrived on the scene and they assisted Heidelmeier in handcuffing plaintiff and placing him in a squad car. Defendants state that due to plaintiff's extreme resistance to their attempts to place

him under arrest, it took the efforts of all five officers to control him.

Defendants contend that no one struck, beat or abused plaintiff while in the parking lot where he was arrested. Defendants Johnson, Payne and Deevey add that at that point their involvement in the arrest ended and that they saw no one abuse plaintiff at the police station either. PX D-F. Shortly after plaintiff arrived at the police station, paramedics were called. Plaintiff spent several days in the hospital for treatment of multiple trauma and several broken ribs. DX A at 76; PXF.

Plaintiff contends that he was experiencing an insulin reaction at the time of his arrest. His physician has testified that as a consequence, plaintiff's recollection of relevant events would be very poor and he would probably have been greatly weakened. However, in a small percentage of cases, a person undergoing an insulin reaction may show greater than normal strength. According to his doctor, during an insulin reaction, plaintiff could be coherent for brief periods of time and he could engage in conversation and control motor functions. The motor deficit would resemble that caused by intoxication. DX B at 5-21. Consistent with that testimony, plaintiff disclaims recollection of specific actions taken by defendants. However, he claims that he can recall experiencing extreme pain at various points, as when his arm was placed in an armlock and he was forced to the ground. Plaintiff denies having resisted the officers' efforts as they say he did, and he contends that the beating and verbal abuse continued after his arrival at Village's police station. Plaintiff's

expert witness would testify that defendants used excessive force in the arrest and otherwise responded inappropriately to the little risk that plaintiff posed.

Plaintiff was charged with criminal offenses of disorderly conduct, battery and resisting arrest. At the time of his trial in the state court, plaintiff asserted the defense that he lacked the requisite mental state for the offenses charged. Plaintiff also testified that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed he was being dragged up the stairs of Village's police station. In the interim, he only remembered feeling a lot of pain. DX A at 69-70, 78. However, plaintiff recalled seeing Heidelmeier and Esposito while being beaten at the police station. DX A at 73-74, 83. Having heard each side's version of the events, and the medical testimony concerning the effects of an insulin reaction, the trial court found that plaintiff came into contact, struck, and resisted a peace officer. Although the judge found defendants' testimony credible and felt that all other elements of the charges against plaintiff had been proven, he concluded that the State had not proven beyond a reasonable doubt that plaintiff acted knowingly. The basis of the finding as to mental state was the testimony concerning plaintiff's diabetes and insulin shock. DX B at 30-33.

Claims of Excessive Force, Assault and Battery

The present motion for summary judgment asks the court to take into account plaintiff's inability to recall events that transpired prior to his arrival at the police station. Since plaintiff cannot recall specific details, only

the individual defendants can provide eyewitness testimony concerning the circumstances of his arrest. All defendants having testified that no one beat or abused plaintiff, they ask the court to dismiss the claims of Johnson, Deevey and Payne. These three officers attest that they played no role in processing plaintiff after his arrest and plaintiff specifically recalls only Heidelmeier and Esposito. Plaintiff challenges the veracity of the three officers' affidavit testimony and observes that even if an officer did not actually participate in a beating, a jury may consider an excessive force claim against him if the officer stood by and allowed others to beat the plaintiff. *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *Wilson v. City of Chicago*, 707 F. Supp. 379, 385 (N.D. Ill. 1989).

Regarding the claims against Heidelmeier and Esposito, defendants posit that the only competent testimony concerning the circumstances of the arrest is their own. Defendants argue that the court should not credit plaintiff's testimony, as his own doctor testified that he would not rely on anything plaintiff told him about the incident. Defendants further suggest that plaintiff should be estopped from taking a position in this litigation that is inconsistent with his defense to the criminal charges in the state court, but this court disagrees that such inconsistency exists. As already noted, plaintiff testified in the state court to feelings of great pain during the arrest and to some specific recollections of mistreatment at the police station. While present ability to recall in greater detail may diminish his credibility, there is no obvious contradiction of his former testimony such that his testimony cannot be considered here.

Summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ' [sic] Fed.R.Civ.P. 56(c). In examining the record, all reasonable inferences from it are drawn in the light most favorable to the nonmovant. *Maxwell v. City of Indianapolis*, 998 F.2d 431, 433 (7th Cir. 1993). Plaintiff has the burden, however, of establishing a genuine issue for trial.

Applying these principles here, defendants are denied summary judgment on the claims of excessive force, assault and battery. Plaintiff lacks eyewitness testimony supporting his theory of the events surrounding his arrest, but there is sufficient circumstantial evidence supporting his theory of the case. While the culpability of particular defendants may vary, on the present record, it cannot be determined whether the claims against them should be dismissed.

Claims of Unlawful Arrest, False Imprisonment and Malicious Prosecution

In moving for summary judgment on these claims, defendants rely on several propositions of law, all of which in themselves are correct. First, if defendants establish probable cause for plaintiff's arrest, his claims under §1983 of false arrest, false imprisonment and malicious prosecution necessarily fail. *Biddle v. Martin*, 992 F.2d 673, 678 (7th Cir. 1993); *Mark v. Furay*, 769 F.2d 1266, 1268-1269 (7th Cir. 1985). The existence of probable cause

is also a defense to state law claims of false arrest, false imprisonment and malicious prosecution. *Myatt v. City of Chicago*, 816 F. Supp. 1259, 1267 (N.D. Ill. 1992) (citing *Mosley v. La Mastus*, 741 F. Supp. 724 (N.D. Ill. 1990)); *Jones v. Village of Villa Park*, 815 F. Supp. 249, 252-253 (N.D. Ill. 1993). Probable cause existed if at the moment of the arrest, the facts and circumstances within defendants' knowledge were sufficient to warrant a prudent man in believing that a crime was being or had been committed. *See Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534, 537 (1991).

Besides challenging plaintiff's showing of probable cause, defendants raise qualified immunity as a defense. Qualified immunity shields law enforcement officers from damages if they " 'reasonably but mistakenly conclude that probable cause is present.' " *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). If a case involves questions as to whether probable cause existed to support officers' actions, the case should not be permitted to go to trial if there is *any* reasonable basis to conclude that probable cause existed. *Biddle*, 992 F.2d at 676.[1] On the other hand, claims of qualified immunity are not susceptible to resolution on summary judgment if

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[1] Qualified immunity may also apply in cases of excessive force claims under §1983. *See Rice v. Burks*, 999 F.2d 1172 (7th Cir. 1993). In such cases, a plaintiff may not base his claim on mere speculation that force was excessive. *Id.* at 1175. However, the plaintiff may avoid the application of qualified immunity if he can show that the force used was so excessive that officers should have been on notice that they were violating the fourth amendment. *Id.* at 1174.

there is substantial overlap between the issue of immunity and the principal issue on the merits. *Maxwell v. City of Indianapolis*, 998 F.2d 431, 435-436 (7th Cir. 1993). *See also Meyer v. Robinson*, 992 F.2d 734, 737 (7th Cir. 1993). Thus, in a false arrest case, an officer might be denied summary judgment on a qualified immunity defense if the evidence raises questions as to whether a reasonable police officer would have found probable cause for an arrest. *See Maxwell*, 998 F.2d at 436; *Mahoney v. Kesery*, 976 F.2d 1054, 1058 (7th Cir. 1992). This result may obtain even if all officers involved in the arrest subjectively believe the arrestee is committing or has committed a crime. *Id.*

The establishment of probable cause for a disorderly conduct arrest requires only a reasonable belief that the arrestee's conduct threatened a breach of the peace. *See id.* at 677-678. While defendants maintain that the test is easily met here, again that contention rests on their own testimony. Plaintiff has not been able to summon eyewitness testimony to the contrary, but he has a sufficient explanation for his inability to do so. Plaintiff has also presented evidence that, at the time of his arrest, he may have been weakened by the insulin reaction and unable to summon the level of resistance that defendants claim he did. If obviously weakened, it is conceivable that no reasonable officer might have found cause for arrest. Plaintiff's inability to recall is potentially more detrimental to his claims of lack of cause to arrest than it is to his claims of excessive force, since the fact of his injuries supports an inference of excessive force used. As determined above, the excessive force claims must be tried. Since there is substantial overlap between the claims of

excessive force and lack of probable cause, and because there is at least some possibility plaintiff could prove lack of probable cause, the court will deny summary judgment on the question of probable cause to arrest.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is denied.

ENTER:

JOAN B. GOTTSCHALL
United States Magistrate Judge

DATED: October 26, 1993